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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 799

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MADDEN FURNITURE, INC. AND MARGUERITE MADDEN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETER O. KNIGHT,
C. FRED THOMPSON,
JOHN BELL,
Counsel for petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 799

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MADDEN FURNITURE, INC. AND MARGUERITE MADDEN.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Metropolitan Life Insurance Company, a corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision and judgment of that Court.

Statement of the Matter Involved.

These companion cases originated in the District Court of the United States for the Southern District of Florida, where they were consolidated for trial and twice tried to juries, and they have been appealed to the Circuit Court of

Appeals three times, each appeal resulting in a reversal of the judgments below. The first decision of the appellate court is reported in 117 Fed. (2) 446, the second in 127 Fed. (2) 837, and the third, now sought to be reviewed, in 138 Fed. (2) 708.

In suits by beneficiaries upon life insurance policies, following death of the insured, the insurance company interposed defenses that the applications contained misrepresentations voiding the policies. One of these arose by the applicant's false answer "none" to Question 13 in each application, inquiring what physicians, if any, he had consulted or been treated by within the past five years. The defenses set forth wherein such answer was false (R. 10, 15). The first opinion of the Court of Appeals contains a complete statement of the issues and the evidence. At the trial, when all the evidence was in, the defendant moved for directed verdicts upon grounds that it had proven its defenses (R. 88). The motion being denied, verdicts and judgments were for the plaintiffs (R. 99, 108, 109).

On appeal, the Court of Appeals noted that the purpose of Question 13 was to reveal medical consultations and treatments of the applicant, so that the insurer might have the benefit of this information as a basis for further inquiries in determining his insurability, and that the answer sought to be elicited by the question was an answer of fact and not of opinion. The court found "that the evidence, as to both the materiality and the falsity of this answer, was conclusive", and held that, since "here, the answer was, and was known to be, untrue, its giving prevented recovery on the policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive." The court further held "that the evidence admits of no other conclusion than that, whether or not fraudulently intended, it was deliberately and knowingly made; and that because of this misrepresentation, the judgment may not stand."

The court said that its decision was in accord with settled law in Florida, as well as with its own repeated decisions. The judgments were reversed and the cases remanded for further and not inconsistent proceedings.

The District Court considered that this meant the reinstatement of previously overruled motions of the insurance company for judgments notwithstanding the verdicts, made under Rule of Civil Procedure 50(b), and that such motions should be granted forthwith (R. 100, 106, 149, 150). Judgments entered accordingly were reversed by the Court of Appeals, which held that its reversal of the original judgments for errors prior to verdict, "although one was the refusal to direct a verdict, with a remand for further consistent proceedings, meant a new trial with an avoidance of the same errors."

Upon retrial the district judge, holding that the evidence thereon was the same in substance as that offered on the first trial and that the opinion on the first appeal demanded verdicts and judgments for defendant, directed verdicts and entered judgments accordingly, from which plaintiff beneficiaries again appealed (R. 208, 210, 211, 212). The Court of Appeals agreed with the District Court "that the additional evidence was in substance and legal effect the same as that offered in the former trial, and that under the rule laid down on the first appeal, a verdict for defendant was demanded." It further held, however, that the Supreme Court of Florida, in the case of *Metropolitan Life Ins. Co.* v. *Poole*, 3 So. (2) 386, decided subsequent to its first decision, "has laid down a different rule from that announced by us, and that under that rule it was for the jury to say whether Madden's answer to question #13, though false, was made in good faith and, therefore, did not vitiate the policy." Saying it was bound to follow the Florida court, and that, under Florida law, plaintiffs were entitled to go to the jury on the issue of intentional or conscious

fraud, the judgments were reversed and the cases remanded for further and not inconsistent proceedings (R. 216-220). Appellee's petition for a rehearing was denied without opinion (R. 221-232, 233).

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, United States Code, Title 28, Section 347(a).

The judgment of reversal sought to be reviewed was rendered November 10, 1943, and appellee's petition for a rehearing was denied January 3, 1944.

Question Presented.

The question presented is whether the Circuit Court of Appeals misconstrued the decision of the Florida Supreme Court in *Metropolitan Life Insurance Company* v. *Poole*. A copy of the opinion delivered on such decision is appended to this petition.

Reasons Relied On for the Allowance of the Writ.

This Court should grant a review on writ of certiorari because the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions. In a recent case, *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 83 L. Ed. 515, 59 S. Ct. 420, this Court reviewed, on certiorari, a decision of a circuit court of appeals on the ground that, in a case controlled by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, that court misconstrued a state supreme court decision.

That the question involved is substantial is manifest upon its face, its general and prime importance to life insurance companies doing business in the State of Florida and to

persons insured by such companies and their beneficiaries, being readily apparent.

Petitioner therefore prays issuance by this Court of a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit so that the decision and judgment complained of may be reviewed thereon.

PETER O. KNIGHT,
C. FRED THOMPSON,
JOHN BELL,
Of Counsel for Petitioner.

KNIGHT & THOMPSON,
Of Tampa, Florida,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The opinion of the Court of Appeals delivered upon the first appeal is reported in 117 Fed. (2) 446, that upon the second appeal in 127 Fed. (2) 837, and the one upon the third appeal in 138 Fed. (2) 708.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, United States Code, Title 28, Section 347(a).

By its last decision the Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions.

A sufficient statement of the facts in the case is contained in the accompanying petition.

The judgment of reversal sought to be reviewed was entered November 10, 1943, and appellee's (petitioner's) petition for a rehearing was denied without opinion January 3, 1944.

In reversing the judgment of the District Court on the third and last appeal, upon authority of *Metropolitan Life Ins. Co.* v. *Poole,* 3 So. (2) 386, (a copy of the opinion in which case is appended hereto) the Court of Appeals misconstrued the holding of the Supreme Court of Florida in that case, so that its judgment is now in conflict with settled law in Florida.

The error relied on is the holding that the Florida Supreme Court, by its decision in the *Poole* case, reversed a settled rule of law in its state.

Summary of Argument.

1. Precedent for granting a review.

2. Construction of the *Poole* Case by the Court of Appeals is erroneous.

3. The last decision of the Court of Appeals is in conflict with applicable local decisions.

Argument.

1. Precedent for Granting a Review.

Since its decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, this Court has granted a review on writ of certiorari of a decision of a circuit court of appeals upon petition showing that in a case controlled by *Erie Railroad Co.* v. *Tompkins* the court of appeals misconstrued a decision of a state supreme court in holding it to have changed previously settled local law. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 83 L. Ed. 515, 59 S. Ct. 420.

2. Construction of the *Polle* Case by the Court of Appeals is Erroneous.

The Court of Appeals predicated its holding that the *Poole* case changed previously settled law in Florida upon a headnote to the Florida court's opinion, reading, "False answers made by insured in good faith to questions in application for life insurance policy do not vitiate policy", and also upon what it conceived to be the Florida court's "express approval of charges five and six", which, although not shown in the opinion in the *Poole* case, are exhibited in footnote 8 to the opinion by the Court of Appeals. (R. 218.) They were taken from the record of the *Poole* case which was filed in the Court of Appeals, and are, in substance, to the effect that the test to apply is whether the answers were made in good faith, and that representations touching consultations with or treatments by a physician stand on the same footing as representations of good health and do not furnish basis for avoiding liability on the policy unless they relate to some serious ailment material to the question of life expectancy. The Court of Appeals said that the Florida Supreme Court, in its ruling on these charges, "expressly

rejected the distinction made in the *Madden* case, and accepted by most of the courts in the country, between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. * * * It was taking its place with courts (citing four cases in footnote 12) which hold that, where a statute or policy, as here, provides that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury. * * *"
(R. 218-219.)

The *Poole* case does not purport to decide the point which the Court of Appeals held was determined therein, the only issues considered or noticed by the Florida court being stated by that court as follows:

> "The defense interposed by the insurance company was in effect that the insured had made false answers to questions contained in the application for the policy and set forth wherein such answers were false. The plaintiff interposed replications denying that such answers were made by the applicant for insurance and alleging that the answers were written in the application by the agent of the insurance company without the knowledge of the applicant and that the agent assumed to write such answers, relying upon his own information and without having been advised concerning the facts by the applicant."

There is no such issue in these *Madden* cases. The Florida court held that in reviewing the *Poole* case on certiorari it could not go behind the judgment of the court below entered upon conflicting testimony; by which judgment the issues stated as above were adjudicated in favor of the plaintiff beneficiary and it so established that none of the

answers were in truth those of the applicant. Any distinction between answers of opinion as to whether the applicant had suffered from particular ailments and those of fact as to whether he had or had not consulted a physician, was therefore immaterial, and the court made no such distinction. The case is not a precedent for the elimination of a distinction between the two types of answers in cases where they were actually made by the applicant.

The Florida court did not approve the charges in the *Poole* case as correct abstract statements of law, appropriate in cases where, as in these *Madden* cases, the false answers were made by the applicant, its only reference to them being a statement that they "were appropriate to the issues made by the pleadings and the evidence." The charges do not appear in the opinion, which is sufficiently clear that no resort to the record in the case is necessary to determine what was decided. Furthermore, the Court of Appeals was not justified in holding the Florida court to have given "express approval of charges five and six" because their giving may have constituted reversible error in appellate proceedings without affecting the decision by the Florida court. The Florida Supreme Court was reviewing on writ of certiorari to a state circuit court a judgment of that court affirming a judgment of a civil court of record. The Florida constitution gives to circuit courts of that state final appellate jurisdiction in all cases arising in civil courts of record and does not authorize two successive appeals from judgments in such cases, one to a circuit court and another to the Supreme Court, wherefore, in proceedings in certiorari addressed to a circuit court as an appellate court in a case arising in a civil court of record, questions relating to the merits but in no wise affecting jurisdiction or the external proceedings in the case will not be reviewed, there being some substantial supporting evidence, the certiorari

authorized in such instances extending only to illegal proceedings that appear of record, as distinguished from erroneous actions of the trial or appellate courts. *Mutual Benefit Health & Accident Association* v. *Bunting*, 183 So. 321, and particularly with reference to charges, *Vanderpool* v. *Spruell*, 139 So. 892. The Florida Supreme Court has never quashed a judgment on certiorari because of erroneous charges to the jury.

The headnote to the opinion in the *Poole* case which is quoted in the last opinion of the Court of Appeals must be considered in relation to the body of the opinion it purports to digest. It can be made to fit the opinion only by interpolations demanded by the holding of the court, as follows, "False answers (written in an application by the insurer's agent without knowledge of the applicant) made (submitted to the insurer) by insured in good faith, to questions in application for life insurance policy, do not vitiate policy."

The only reference to good faith in the opinion in the *Poole* case is found in a quoted excerpt from the opinion in an earlier Florida case, *New York Life Ins. Co.* v. *Kincaid*, 165 So. 553, which is not in point with these *Madden* cases. An analysis of that case was made by the Florida court in *Winer* v. *New York Life Ins. Co.*, 197 So. 487. Under the issues recited in the opinion in the *Poole* case, the applicant Poole's good faith was not under consideration as appurtenant to false answers given by him, as the applicant Madden's good faith must be considered, and could only have been material in determining whether Poole consciously participated in the fraud practiced upon the insurance company by its agent so as to preclude recovery by the beneficiary. Poole's fraudulent concealment of knowledge that he suffered from or had consulted with or been treated by a physician for some serious ailment material to the question

of life expectancy would have precluded recovery on the policy regardless of his being questioned, the applicant's good faith in such cases being universally held a prerequisite to recovery.

No authorities establishing the rule attributed to the Florida court in the *Poole* case are cited in the opinion in that case, but on the contrary that court states in the opinion that the case is ruled by *Mutual Life Ins. Co.* v. *Hurni Packing Co.* (8 Cir.) 260 Fed. 641, text 646, *New York Life Ins. Co.* v. *McCarthy* (5 Cir.) 22 Fed. (2) 241, and *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 446, 28 L. Ed. 447, in all of which the very distinction which the Court of Appeals held was expressly rejected by the Florida court was drawn and made the basis of decision. The result is that the Court of Appeals has held, paradoxically, that the rule announced by it in *New York Life Ins. Co.* v. *McCarthy* (cited in footnote 4 to its last opinion), was repudiated by the Supreme Court of Florida in the *Poole* case, although the Florida court, in its opinion in that case, expressly states, "This case is ruled by * * * *New York Life Ins. Co.* v. *McCarthy* (5 Cir. § 22 F. (2d) 241. * * *"

The *Kincaid* case has been heretofore referred to. The remaining cases cited in the opinion, three decided by the United States Supreme Court and one by the Florida Supreme Court, are all in point with the issues stated; in one of them there was testimony that the insurer's agent assumed to write the alleged false answers into the application, relying upon his own information and without having been advised concerning the facts by the applicant and without the applicant's knowledge or assent, while in the other three it was shown that the applicant answered the questions truthfully but different and false answers were substituted in the application by the agent.

3. *The Last Decision of the Court of Appeals Is in Conflict with Applicable Local Decisions.*

The Court of Appeals said in both its first and last opinions that its first decision was in accord with the then "settled law" in Florida. In its last opinion the court said that most of the courts in the country accepted the distinction between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. In construing Florida decisions the Court of Appeals should be constrained to interpretations that will harmonize them with previously settled law. We have seen no cases holding that a misrepresentation by way of a false answer of fact will not bar recovery on a policy unless found by a jury to have been "made with conscious intent to deceive," where "the answer was, and was known to be, untrue" and "was deliberately and knowingly made," and where the information that would have been revealed by a truthful answer was, under conclusive evidence, "material as matter of law" to the insurer "as a basis for further inquiries in determining his (applicant's) insurability." (The phrase first quoted in the above sentence is from the last opinion, the others from the first opinion.) None of the four cases cited in footnote 12 to the Court of Appeals' last opinion sustain such a proposition, but on the contrary the first three support the court's first decision and in the fourth it was held merely that the illness for which the consultations were had was so inconsequential that the case came within the rule excusing failure to disclose such consultations (R. 219). The statement to which they are cited, "that, where a statute or policy, as here, provides that all statements by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious

intent to deceive," implies that the Florida court based its decision in the *Poole* case upon that policy provision. The Florida court does not say in its opinion whether the statements there under consideration were representations or warranties, and in view of the establishment that they were not in truth made by the applicant at all, their classification was immaterial.

If the construction put on the *Poole* case by the Court of Appeals stands, the Florida Supreme Court is committed to a per curiam overruling of its former decisions, without so much as referring to them, and the establishment of a doctrine having no precedent and grossly unfair to life insurance companies doing business in its state.

The frequency with which the question involved arises in the courts is demonstrated by its having been passed upon by the Circuit Court of Appeals for the Fifth Circuit in the following five cases appealed from the District Court for the Southern District of Florida since 1930 and prior to institution of the *Madden* actions.

Tutewiler v. Gardian Life Ins. Co., 42 Fed. (2) 208;

Equitable Life Assur. Soc. v. Schwartz, 42 Fed. (2) 646;

Aetna Life Ins. Co. v. Bolding, 57 Fed. (2) 626;

Pacific Mutual Life Ins. Co. v. Cunningham, 65 Fed. (2) 909, reversing (District Court) Pacific Mutual Life Ins. Co. v. Cunningham 54 Fed. (2) 927. Certiorari denied Cunningham v. Pacific Mutual Life Ins. Co., 54 S. Ct. 121, 290 U. S. 685, 78 L. Ed. 590;

Phillips-Morefield v. Southern States Life Ins. Co., 66 Fed. (2) 29.

The question was also decided by the Florida Supreme Court on two occasions between the first trial of these *Madden* cases and rendition of the first decision therein by

the appellate court; in Thompson v. New York Life Ins. Co., 197 So. 111, and Winer v. New York Life Ins. Co., 197 So. 487. Both of these cases are cited by the Court of Appeals in its first opinion and there followed, and in its last opinion as illustrating the former rule in Florida. Neither of them is cited in the *Poole* case opinion, written one year after they were decided; nor is the first decision of the Court of Appeals in these *Madden* cases cited in that opinion, although it was rendered five months before the opinion was written.

The question has also been before the Circuit Court of Appeals for the Fifth Circuit in one case decided subsequent to its first decision in the *Madden* cases and prior to its last. That case, Sun Life Assurance Co. v. Maloney, 132 Fed. (2) 388, also arose in the District Court for the Southern District of Florida, and the appellate court rested its decision solely upon its first decision in the cases at bar, thus:

> "We need not, however, consider or determine whether appellant or appellee has the right of it in respect of the first defense, for we think it settled by Metropolitan Life Insurance Co. v. Madden, 117 Fed. (2) 446, that the verdict should have been directed for defendant on its second defense that assured falsely answered questions seeking information which was material to the risk."

The decision in the *Poole* case antedated this decision in the *Maloney* case by some eighteen months and, by a coincidence pointed out in petitioner's brief on the last appeal and in its petition for a rehearing, one of the appellee Maloney's attorneys also represented the respondent Poole in the Florida Supreme Court; in spite of which it was not argued in the *Maloney* case that the *Poole* case was in point and had the effect of changing any rule of law in Florida. The *Poole* case was, however, called to

the attention of the Court of Appeals by counsel for the appellant insurance company in their brief in the *Maloney* case and by them successfully distinguished in the same manner as petitioner's counsel unsuccessfully attempted to distinguish it on the last appeal in the *Madden* cases.

The *Poole* case had also been decided when the second appeal was taken in the cases at bar, respondents' counsel vigorously contending on that appeal that the decision on the first appeal should not be applied because it was contrary to the *Poole* case. Nevertheless, the Court of Appeals said in its second opinion that the first reversal for error found in the first trial "meant a new trial with an avoidance of the same errors." The respondents' contention had been met by petitioner with the same argument, that the *Poole* case does not purport to change Florida law, which was advanced by the appellant insurance company in the *Maloney* case and again by petitioner on the last appeal.

The Court of Appeals' first decision is followed, and its opinion thereon quoted from at length, by Circuit Judge Parker in his opinion for the Circuit Court of Appeals for the Fourth Circuit in McSweeney v. Prudential Insurance Co., 128 Fed. (2) 660, wherein it is held that the question as to whether a case should be submitted to the jury or verdict directed is a matter of federal practice as to which local decisions are not controlling, and further, with respect to fraud, that clearly "fraud of the sort required to avoid the policy is shown to exist where there is a false representation as to a material matter, which is false to the knowledge of the applicant at the time it is made and which is made for the purpose of being acted on by the company. Where these facts appear, it is idle to inquire further whether there was intent to defraud; for the intent to defraud in such case is the intent to obtain the policy by the false representations."

The opinion of the Court of Appeals of New York in Geer v. Union Mutual Life Ins. Co. (1937), reported in 7 N. E. (2) 125, is the most exhaustive one we have found on the question here under consideration. The case is cited by the Court of Appeals in footnotes to both its first and last opinions.

The writ prayed for in the petition should be granted.

Respectfully submitted,

PETER O. KNIGHT,
C. FRED THOMPSON,
JOHN BELL,
Of Counsel for Petitioner.

APPENDIX.

METROPOLITAN LIFE INS. CO. V. POOLE.

Supreme Court of Florida.

July 1, 1941.

Rehearing Denied July 31, 1941.

1. Certiorari (Key 68)

In reviewing case on certiorari, it is not Supreme Court's province to go behind lower court's judgment on conflicting testimony.

2. Insurance (Key 256 (2))

False answers, made by insured in good faith, to questions in application for life insurance policy, do not vitiate policy.

BROWN, *C. J.*, dissenting.

En Banc.

Certiorari to Circuit Court, Dade County; Ross Williams, Judge.

Action by Gwendolyn B. Poole against the Metropolitan Life Insurance Company on a life insurance policy. To review a judgment affirming a judgment for plaintiff, defendant brings certiorari.

Writ of certiorari quashed, and cause dismissed.

Shutts, Bowen, Simmons, Prevatt & Julian, L. S. Julian, and L. S. Bonsteel, all of Miami, for petitioner.

Chappell & Brown, of Miami, for respondent.

PER CURIAM:

On writ of certiorari to the Circuit Court in and for Dade County, Florida, we review judgment affirming a judgment of the Civil Court of Record in and for Dade County, Florida, in favor of the plaintiff on an insurance policy.

In the court below there were fifteen assignments of error. The first assignment of error challenges the action of the Court in refusing defendant's request for an instructed verdict in favor of the defendant.

The second to ninth, inclusive, assignments of error challenged the propriety of the charges given by the court.

The tenth to fifteenth assignments of error were as follows:

> "10. The Court erred in denying the defendant's motion for a new trial in that the Court erred as hereinabove set forth.
>
> "11. The Court erred in denying the defendant's motion for a new trial in that the verdict is contrary to the weight of the evidence.
>
> "12. The Court erred in denying defendant's motion for a new trial in that the verdict was wholly unsupported by the evidence.
>
> "13. The Court erred in entering final judgment for the plaintiff in that the verdict is contrary to the weight of the evidence.
>
> "14. The Court erred in entering final judgment for the plaintiff in that the verdict is wholly unsupported by the evidence.
>
> "15. The Court erred in entering final judgment for the plaintiff in that the verdict is contrary to the law."

The defense interposed by the insurance company was in effect that the insured had made false answers to questions contained in the application for the policy and set forth wherein such answers were false. The plaintiff interposed replications denying that such answers were made by the applicant for insurance and alleging that the answers were written in the application by the agent of the insurance company without the knowledge of the applicant and that the agent assumed to write such answers, relying upon his own information and without having been advised concerning the facts by the applicant.

(1, 2) The charges complained of were appropriate to the issues made by the pleadings and the evidence. The evidence was conflicting. It is not the province of this Court in reviewing a case on certiorari to go behind the judgment of the court below entered upon conflicting testimony. This case is ruled by our opinion and judgment in the case of New York Life Insurance Co. *v.* Kincaid, 122 Fla. 283, 165 So. 553, and cases there cited. See also Massachusetts Bonding & Ins. Co. *v.* Williams, 123 Fla. 560, 167 So. 12.

In the *Kincaid* case (122 Fla. 283, 165 So. 557), we said:

> "It is now contended that Kincaid knowingly made misrepresentations to the company in that he did not disclose all his visits to Dr. Osenback, and what he was treated for each time during the two-year period covered by the questionnaire and that his policies would not have been reinstated if the undisclosed visits and what they revealed had been known to the company. The issue of whether or not Kincaid knowingly made misrepresentations to the company was fully developed by plea, replication, rejoinder, and surrejoinder, which we have examined, but do not deem necessary to enlarge on here.
>
> "Even if he failed to make a full disclosure with reference to his insurability, it does not necessarily vitiate his reinstatement. The test is whether or not his answers to the questionnaire were made in good faith, and, as said in the preceding paragraph, this question was squarely presented by the pleadings and was for the jury to determine. Their verdict finds ample support in the evidence and should not be disturbed."

And cited: "Mutual Life Ins Co. of New York *v.* Hurni Packing Co. (8 Cir.) 260 F. 641, text 646; New York Life Ins. Co. *v.* McCarthy (5 Cir.) 22 F. (2d) 241; Moulor *v.* American Life Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; Rose's Notes, Rev. Ed. Supplement to Vol. 2, page 783; also Vol. 12, pages 544, 545; Couch on Insurance."

In the *Williams* case, supra (123 Fla. 560, 167 So. 15), in discussing the admissibility of parol evidence as against the statements contained in the application signed by the applicant, we said: "The contention that it is violative of the parol evidence rule to permit introduction of evidence to show that the answer inserted in the application by the agent was not the answer given by the insured, is without merit. Parol evidence is admissible to show that the answer written in the application is not the answer given by the applicant, on the ground that the statements are not those of the insured and he may show their true character. To hold otherwise would be to make a rule of evidence adopted as a protection against fraud an instrument of the very fraud it was intended to prevent. See Union Mutual Life Insurance Co. *v.* Wilkinson, 13 Wall. 222, 20 L. Ed. 617; American Life Insurance Co. *v.* Mahone, 21 Wall. (152), 88 U. S. 152, 22 L. Ed. 593; New Jersey Mutual Life Insurance Co. *v.* Baker, 94 U. S. 610, 24 L. Ed. 268."

On consideration of the entire record, we find no error disclosed which would warrant our quashing the judgment of the Circuit Court.

Therefore, the writ of certiorari heretofore issued is quashed and the cause dismissed.

So ordered.

WHITFIELD, BUFORD, CHAPMAN, THOMAS, and ADAMS, *JJ.*, concur.

BROWN, *C. J.*, dissents.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 799

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MADDEN FURNITURE, INC. AND MARGUERITE MADDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS.

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MORRIS E. WHITE,
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SUPREME COURT OF THE UNITED STATES

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No. 799

METROPOLITAN LIFE INSURANCE COMPANY,
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BRIEF FOR RESPONDENTS.

Statement.

The chronological record of these cases is set forth in the petition for certiorari. Petitioner's interpretations of the various holdings of the Circuit Court of Appeals do not in all respects coincide with ours. Such differences as are deemed material will be noted in the argument.

Petitioner does not discuss the evidence, either in its petition or brief. This, too, we shall briefly discuss in our argument.

Questions Presented.

The only question, it seems to us, is whether petitioner has made it appear that the Circuit Court of Appeals has misapplied the Florida decision, *Metropolitan Life Insur-*

ance v. *Poole*, 3 So. (2) 386, decided by the Florida court subsequent to the first decision in these cases by the Circuit Court of Appeals (117 F. (2) 446).

ARGUMENT.

Did the Circuit Court of Appeals misconstrue the decision of the Florida Court in the Poole case?

The Florida court is required by statute to prepare headnotes (Sec. 25.27—Fla. Statutes, Ann. 1941), epitomizing its decisions. The escond headnote in the *Poole* case (3 So. (2) 386), sustained in the body of the opinion, reads:

> "False answers, made by insured in good faith, to questions in application for life insurance policy, do not vitiate policy."

Upon its face this squarely counters the proposition announced by the Circuit Court of Appeals in its first decision (117 F. (2) 446):

> "* * * its giving (the false answers) prevented recovery on the policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive."

The opinion in the *Poole* case does not state what questions in the application had been falsely answered, it does not reveal what the evidence was, nor does it contain the charges given. It shows the charges given by the trial court were made the basis of assignments of error "second" to "ninth", and holds: "The charges complained of were appropriate to the issues made by the pleadings and the evidence."

In this state of affairs and in order that the Circuit Court of Appeals might see exactly what issues were made by the pleadings, what the evidence was, and what the

charges were, we filed a certified transcript of the *Poole* case with that court, having in mind that an appellate court will examine the record of a prior case for the purpose of understanding the opinion (*Elizabethport Cordage Co.* v. *Whitlock*, 190 So. (Fla.) 20; *Sholtz* v. *Hartford Acc. & Ind. Co.*, 5 Cir., 88 F. (2) 184), and having also in mind the admonition of this court that it is the duty of the federal courts "to ascertain from all available data what the state law is and apply it" *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; 61 S. C. T. 179. The record is, of course, available data, certainly to the extent it explains and clarifies the holding of the court.

The opinion of the Circuit Court of Appeals quotes two of these charges, showing that it made use of the record. This was made the basis of some complaint in a petition for rehearing filed by petitioner in that court (R. 223).

Now, petitioner is asking this court to hold that the Circuit Court of Appeals misconstrued the holding of the *Poole* case, and this without bringing to this court the record of the *Poole* case.

The broad rule announced in the *Poole* case (headnote above quoted), if applied literally, would make it unnecessary even to read the text of the opinion. Petitioner itself, however, says, in effect, that that has got to be limited to the facts of the case, that it should not be applied except to cases like the *Poole* case. Then it contends that the *Poole* case opinion shows that it was entirely different from the cases at bar. But one cannot escape the conclusion that while the opinion in the *Poole* case does not so clearly show the facts were like those in the cases at bar, it certainly does not show that the facts of that case are different from those in the cases at bar. The categorical language of that opinion condensed into the second headnote, immediately arrests attention; and when it appears that the Circuit Court of Appeals examined the record and

specifically held that the language did apply to these cases, and control them, it is a refusal to face the facts to come before this court without that record and strain at an impossible construction of the opinion.

Note the positive language of the Circuit Court of Appeals (R. 218):

> "We are equally without doubt, however, * * * that the Supreme Court of Florida in the *Poole* case has laid down a different rule from that announced by us, and that under that rule it was for the jury to say whether Madden's answer to question 13, though false, was made in good faith and, therefore, did not vitiate the policy. This is made clear not only by the headnote * * * but by the court's express approval of the charges five and six, the giving of which were assigned as error" (quoting these charges).

No Misconstruction of Poole Case.

It is clear that in order to demonstrate any misconstruction of the *Poole* case, the record of that case must be considered. It is equally clear that the Circuit Court of Appeals considered both the opinion and record. Every presumption is to be indulged in favor of the correctness of that court's opinion and judgment, until the contrary is made to appear.

Beyond this, it is demonstrable that the Circuit Court of Appeals came to the right conclusion, under Florida law, and indeed, under the great preponderance of authority. This may be done upon two theories, first, that false answers innocently made, or made without intent to deceive, do not destroy the insurance (charge 5 in note 8, Record page 218), and second that false representations in applications for life insurance concerning consultations with or treatments by a physician do not furnish the basis for avoiding the policy unless they relate to some *serious*

ailment material to the question of life expectancy (Charge 6 from *Poole* case quoted under Note 8, Record page 218).

Good Faith.

These policies provide that in the absence of *fraud* the answers to the questions shall be deemed representations and not warranties (R. 7). Under this provision it is generally held that an answer, to defeat the insurance, must be shown to have been false *and* that it was made knowingly for the purpose of deceiving the insurer, the burden of such showing being on the insurer. *Wharton* v. *Aetna Life Ins. Co.*, 8 Cir., 48 F. (2) 37; *Northern Life Ins. Co.* v. *King*, 9 Cir., 53 F (2) 613; *New York Life Ins Co.* v. *Simon*, 1 Cor., 60 F. (2) 30; *Weintraub* v. *New York Life Ins. Co.*, 3 Cir., 85 F. (2) 158; *Golightly* v. *New York Life Ins. Co.*, 8 Cir., 85 F. (2) 122. Similar decisions from both state and federal courts could be multiplied by the score. The rule adopted by the Florida court in the *Poole* case is in essence the same.

The contention of petitioner is that question 13, asking what hospitals, doctors, etc., applicant had consulted, as distinguished from question 11, asking if applicant had had stated diseases, calls for facts and not opinions, as the Circuit Court of Appeals first held; that if falsely answered there can be no recovery, and that the fraudulent purpose of the applicant, or absence thereof, is of no consequence. Aside from the fact that the *Poole* case overrules it, the contention overlooks the factor that charge 6 (R. 218, note 8) establishes that only consultations or treatments for those ailments which have a "material bearing on life expectancy" need be stated, and that there is no distinction between the question whether applicant is in good health and the question whether he has consulted or been treated by a physician. This charge completely obliterates the distinction first drawn by the

Circuit Court of Appeals, and still insisted upon by petitioner, between the two classes of questions.

Concede the law to be as set forth in charges 5 and 6 (note 8, R. 218). Concede that Mr. Madden had consulted a doctor which he, for some reason, failed to disclose in answer to question 13; concede, as the evidence shows, that he consulted the doctor several times over a period of months (R. 28); concede that the ailment occasioning the consultation was nothing but a trivial and passing ailment (R. 180), that it was not a disease but only a functional thing (R. 31) having no connection with the coronary thrombosis of which Madden died (R. 33), that he worked all during the time (R. 205), in fact sold the doctor during the time of these consultations a large collection of furniture (R. 189); and concede that the last time he saw the doctor he was told by the doctor that he was perfectly sound and well and could get any kind of insurance he wanted (R. 33), the question inevitably arises: Did he withhold the information with the intention of deceiving the insurer, did he forget it in the hurry and stress of circumstances under which he answered the question (R. 202-203), or did he in good faith, even though he may have recalled the facts, fail to detail the consultation because he understood from his own doctor that he had only had a trivial ailment of no materiality to his life expectancy, and that such things need not in reason or under the law be detailed? Either alternative may explain the absence of the information in his answer, and the fact that this is so necessitates submission of the question to the jury.

He is unable to answer for himself, but he was known as an honest, reliable man (R. 202). No presumption of fraud is to be indulged. The burden was on petitioner to show it. There was not the slightest attempt to do so.

If one will keep in mind that although the form of question 13 is: What clinics, hospitals, physicians, etc., Madden

had consulted or been treated by within the last five years (R. 119), nevertheless the law enters into and becomes a part of the question, and modifies it so as to make it ask only concerning "serious ailments" material to the question of life expectancy, and that even if the applicant answers falsely, but in good faith, the policy is not vitiated (charges 5 and 6, R. 218, note 8), he will have no difficulty in concluding, as did the Circuit Court of Appeals, that, under the evidence, this was a jury case.

No Materiality To Life Expectancy.

Mr. Madden was manager of a furniture store in Gadsden, Alabama, when the consultations with the doctor occurred which he failed to disclose. One day the doctor, an acquaintance, was in the store figuring on some furniture and Madden said something to him about having a cold (R. 30). The doctor told him if he would come by the office he would examine him. Madden went, and in the course of the examination, in his regular routine, the doctor developed that Madden was a heavy eater and frequently after eating heavy meals, highly seasoned foods, he would have heartburn. The doctor examined him thoroughly, his heart, lungs, and kidneys and found nothing wrong (R. 30). Then he gave him barium and examined him under the fluoroscope, which showed nothing wrong except it revealed what the doctor diagnosed as cardio spasm, which he described as a spasm of the muscles in the upper part of the stomach not permitting foods to enter the stomach when ingested rapidly which was due to dietary indiscretion; not a disease but a functional sort of thing arising from eating too much or too rapidly, and overwork, which made him have a sense of fullness and heartburn (R. 30). The doctor modified his diet and had him come back every fifteen days for some time (R. 32). At no time was his gastric

condition deemed sufficient to require drugs, and his symptoms disappeared with normal eating and sleeping habits. It was nothing more than a passing trivial ailment which many people have (R. 180-181). When he first came into the doctor's office his chief complaint did not concern his stomach but the cold, and the stomach investigation was at the doctor's suggestion (R. 180). The doctor further testified that it was nothing uncommon for people to have heartburn, take a little soda and go about their business (in fact he did it himself), that the routine of having Madden come back periodically was the doctor's, and that Madden had no further discomfort two weeks after the examination but was back eating regular food (R. 181).

All the medical testimony was to the effect that cardio spasm was an inconsequential thing. One of the petitioner's witnesses, an internal medicine specialist, said it might be compared to a cramp in the leg, troublesome for awhile but when it was over the leg was "as good as new" (R. 53). Another of petitioner's specialists was familiar with a chronic type of cardio spasm, in the handling of which it was sometimes necessary to dilate the ring between the aesophagus and the stomach, and was troublesome although might "not interfere at all with long life" (R. 64). There are two broad types, acute and chronic; the chronic type being the result of neglecting the acute ones (R. 73). But Madden's was completely cured (R. 32). Evidently the several visits to the doctor, at the doctor's solicitation and not because of any complaint (R. 28), was for the purpose of correcting it, thus to prevent the annoying type from developing. That the purpose was crowned with success is clearly attested from the record.

We need not analyze the evidence further. Suffice it to say that it shows, without conflict, that this was only a trivial and passing thing Madden had, having no bearing

on and no connection with the acute coronary thrombosis of which he died a year or so later (R. 33), 52-53, 64, 80). Such was the testimony of all the doctors on both sides.

Under charge six, given in the *Poole* case (R. 218, note 8) and expressly approved by the Supreme Court of Florida, the failure to note a consultation of or treatment by a physician does not furnish basis for avoiding the policy unless it relates to "Some serious ailment material to the question of life expectancy."

> "Fortunately, the overwhelming weight of authority and almost every recent case upon the subject holds * * * if the medical attendance was for some slight or temporary indisposition which does not contribute to the risk of loss or leave a permanently detrimental effect upon the insured's health, omission to make such disclosure will not relieve the insurer of liability". Appleman on Insurance Law and Practice, Vol. 1, pages 288-291.

The above author goes on to point out that the above rule is supported by many courts which formerly held to the contrary; that the illness may be alarming to the sufferer and yet be trivial and inconsequential from a medical standpoint; and that the courts had gone far enough to include under the head of trivial diseases, "peptic ulcer, prior operation for sinus trouble, slight attacks of influenza and rheumatism, prostatis, or a mild malarial attack", etc.

It is justifiable to suggest that the Florida court in deciding the Poole case was not blazing a new trail but merely following a well established road. See *Prudential Ins. Co.* vs. *Saxe,* 134 F (2) 16, opinion by Mr. Justice Rutledge; *Sovereign Camp* vs. *Moore,* 186 So. (Ala.) 123, where the court points out that some ailments are so serious as to be material as a matter of law, others so trivial as to be immaterial as a matter of law, and still others not assignabel to either class but requiring submission to a jury.

Here again the record in the *Poole* case is helpful as throwing light upon the kinds of ailments the Florida Court considers as falling in the trivial and immaterial class.

Miscellaneous Matters.

Petitioner says that the Florida court did not approve the charges in the *Poole* case as correct abstract statements, appropriate in cases where the *insured* gave the false answer. On the contrary these charges, quoted by the Circuit Court of Appeals specifically go upon the theory that the *insured gave the false answer.* It is quite clear that the *Poole* case involved two theories of defense to the charge that Poole had made false answers in his application for the insurance. First, it was denied that he answered falsely ("gave such answers") and second, it was alleged as a basis of waiver or estoppel, that the company's agent wrote in the answers without the knowledge of the applicant. The court disposes of both by announcing the rule applicable where the false answer is given by the applicant, viz. that they do not vitiate the policy if made in good faith, approving the charges of the trial court (charges 5 and 6, R. 218) as appropriate to that issue and the evidence submitted under it. The court also announced the rule applicable in cases where the agent supplied the answers, with which we are not concerned.

The Circuit Court of Appeals had no doubt that these charges were directed to cases where the false answer was given by the applicant, and it said so in positive terms (R. 218). It had the record of the *Poole* case before it and could readily resolve any doubt left by the opinion as to what the issues, evidence and charges were. We fail to appreciate the soundness of petitioner's position before this court contending that the *Poole* case did not involve certain things and that the Circuit Court of Appeals mis-

construed it, though it does not bring to this court the Poole record.

Petitioner also contends that the correctness of these charges was not properly determinable by the Florida court on certiorari. The answer to this would seem to lie in the fact that the court did review them, expressly holding they were appropriate.

Petitioner says it has seen no case holding that a misrepresentation by way of fact will not bar recovery unless made with conscious intent to deceive, where it was known to be false and was deliberately made (brief page 12). This is an effort to involve an otherwise simple proposition by the confusing process of combining inconsistent quotations from the first and last opinions in these cases. The last opinion does not hold that the answer was given deliberately, with knowledge of its falsity, or that it was material as a matter of law. It held that the good faith of Madden was for the jury. If this is to be tested by whether the answer was deliberately made, then that too is for the jury, notwithstanding any language in the first opinion. The test is not, however, whether the applicant knowingly gave an answer which he knew did not conform to the exact facts. The test is whether he answered falsely for the purpose of deceiving the company to its prejudice. An applicant might have cut a finger and gone to a surgeon to have a stitch put in it. The next week, after the finger is well, he might be examined for insurance, be perfectly conscious that he was treated by the doctor a week before and with these facts fully present in his mind, he might say he had not been treated by a physician without the slightest intention to deceive the company.

Petitioner refers to the case of *Sun Life Assur. Co.* vs. *Maloney,* 132 F (2) 388, a very recent Florida case decided by the Fifth Circuit Court of Appeals, and intimates that

it is inconsistent with its opinion in these cases. It even purports to say what counsel did and did not argue in that case. We have no way of knowing what was argued, nor do we think it matters. Maloney had recently spent considerable time in bed, being treated for a heart ailment which all men of any intelligence know is a serious matter, having a very material bearing on life expectancy. The court found that reasonable men could not have found Maloney had forgot this episode when answering that he had not consulted or been treated by a physician, the equivalent of saying he deliberately answered falsely. Certainly he could not in good faith have thought it not material. This is a perfect illustration of the difference between the man who had been treated for a cut finger and Maloney who had been treated for heart disease. This illustrates the difference between Maloney's case and the cases at bar. Madden had no serious aliment. His was trivial and passing. He had a right to believe from the words of his own doctor that he was perfectly sound. According to the evidence, he was. What motive could he have had to withhold the facts? How can it be supposed he falsely answered with intent to deceive, when he had no earthly reason to deceive? It was rightly held that these cases were for the jury.

Respectfully submitted,

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